

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

**HAWAII NURSES' ASSOCIATION,
OPEIU LOCAL 50**

and

**BIO-MEDICAL APPLICATIONS OF CALIFORNIA, INC. Case 20–CB–258306
AND LIBERTY DIALYSIS-HAWAII, LLC**

Scott E. Hovey, Jr., Esq.,
for the Acting General Counsel.

Manuel A. Boigues, Esq. (Weinberg, Roger & Rosenfeld),
for the Respondent.

Barry W. Marr, Esq. and Kristi K. O'Heron, Esq. (Marr Jones & Wang),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, ADMINISTRATIVE LAW JUDGE. On September 23, 2020, the complaint in this case issued, based on a March 23, 2020 charge filed by Bio-Medical Applications of California, Inc. and Liberty Dialysis-Hawaii, LLC (Charging Party or Employer), which alleges that on December 23, 2019, Respondent Hawaii Nurses Association, OPEIU Local 50 (Union or Respondent) violated Section 8(b)(3) of the National Labor Relations Act (the Act),¹ when the Union refused to provide the Charging Party with information concerning mitigation damages requested one week earlier on December 16, 2019,² in relation to an active grievance filed by the Union in 2018 (the December 16, 2019 Employer RFI).³

The Respondent denies these allegations and argues that it responded to Employer's December 16, 2019 RFI on December 23, 2019, pointing out to the Employer that the requested information was irrelevant and unnecessary for the upcoming arbitration. By January 7, 2020, it became even clearer that the requested economic information would not become relevant and necessary to the Employer, if at all, until the Union prevailed on the merits of its grievance as the

¹ 29 U.S.C. §§ 151–169.

² All dates are in 2019 unless otherwise specified.

³ The Acting General Counsel admits that this case only involves the three items of requested information contained in the December 16, 2019 Employer RFI at request Nos. 1, 6, and 8 regarding the Grievant's economic damages information including her tax records from 2018—present, her gross income for 2018 through the present date and her unemployment, Social Security, or workers' compensation claims from 2018 to the present, also referred to hereafter as the economic information, and not any of the Employer's additional noneconomic requests to the Union. Tr. 44–46.

Arbitrator issued her unchallenged Bifurcation Order which divided the arbitration proceeding into two phases—merits and damages. Consequently, as a result of the ongoing and unchallenged bifurcation agreement between the Union and the Employer, until the Union was successful for the grievant in the initial merits phase, the requested economic information was irrelevant and unnecessary to the Employer until the damages phase was reached, if ever.

I find that on February 24, 2021, the Grievant did not prevail in her merits phase of the arbitration so the requested economic information is now moot, and the complaint shall be dismissed as explained below.⁴

The hearing in this case was held by video on December 8, 2020, due to the compelling circumstances created by the Coronavirus (COVID-19) pandemic. At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, the Charging Party, and the Respondent on January 12, 2021, and Respondent's supplemental March 5, 2021 Motion to Dismiss the Charge and Complaint as Moot and the Acting General Counsel's and Charging Party's supplemental responses filed on March 11 and March 12, 2021, respectively, I make the following

FINDINGS OF FACT

I. JURISDICTION

I find, that the Employer is a Delaware corporation, with an office and place of business in various locations in Hawaii that provides in-patient dialysis treatment, supervised patient at-home self-dialysis, and acute dialysis treatment for hospitalized patients in Hawaii, and that during the years ending on October 31, 2019, the Employer derived gross revenues in excess of \$250,000, and during the same period, the Employer purchased over \$5000 in goods from outside the state for its Hawaii operations, and that at all material times, the Employer has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (GC Exh. 1(c) at 1–2; GC Exh. 1(e) at 1; GC Exh. 4; GC Br. at 6–8.) The Respondent admits, and I further find, that it is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(c) at 2; GC Exh. 1(e) at 1.)

⁴ The transcript in this case is generally accurate but I correct it the transcript as follows: Tr. 53, l. 23: "2019" should be "2020." Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for Acting General Counsel's exhibit; "R Exh." for Respondent's exhibit; "GC Br." for the Acting General Counsel's brief; "CP Br." for Charging Party Employer's brief; "R Br." for the Respondent's brief; and I take administrative notice of Respondent Union's March 5, 2021 Supplemental letter motion to dismiss complaint as moot and the Acting General Counsel's March 11, 2021 and the Charging Party Employer's March 12, 2021 Supplemental brief filings. Although I have included numerous citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

II. ALLEGED UNFAIR LABOR PRACTICES

A. General Background

Charging Party Employer operates 20 dialysis facilities at various locations in the State of Hawaii. (Tr. 29.) Charging Party also provides in-patient dialysis treatment, supervised patient at-home self-dialysis, and acute dialysis treatment for hospitalized patients. Id. Employer employs about 700 employees in the State of Hawaii, and approximately 150 of those employees are nurses, who are represented by the Respondent. (Tr. 30–31.)

Employer and Respondent are parties to a collective-bargaining agreement (CBA), the most recent of which was effective from March 1, 2016 to February 28, 2019. (Tr. 30–31; GC Exh. 1(e) at 16–66.) Respondent represents, for purposes of collective bargaining, “all nurses who can legally practice as registered nurses in the State of Hawaii and who are working as registered nurses...employed by the Employer at its Hawaii facilities.” (GC Exh. 1(e) at 20.) Respondent represents about 150 bargaining unit employees at Employer’s Hawaii facilities. (Tr. 31.)

On July 2, 2018, the Employer terminated the employment of its bargaining unit employee Moria Billiot (Grievant or Billiot). (GC Exh. 2 at 1.)

On July 10, 2018, Respondent Union filed a grievance with the Employer regarding Billiot’s employment termination (Billiot grievance) and Respondent also made a request for information (RFI) from the Employer in connection with the Billiot grievance (July 10, 2018 Respondent RFI). (GC Exh. 2.)

Under the parties’ CBA, if a grievant’s employment has been terminated by the Employer, as occurred here, the grievance goes immediately to step 3 of the multistep grievance process. (Tr. 47; GC Exh. 1(e) at 52.)

On December 19, 2018, Respondent sent a letter request to the Employer demanding a step-4 arbitration with regard to the Billiot grievance. (Tr. 50–51; GC Exh. 3.) This arbitration demand letter also referenced various remedies sought by Respondent from Employer at the requested arbitration if Respondent successfully won Billiot’s grievance. Id.

In both the July 10 and December 19, 2018 grievance filings, the Respondent was asking that the Employer, as part of any proposed remedy, make Billiot whole for lost wages and benefits because of her termination. (GC Exh. 2 at 2; GC Exh. 3 at 2).

Sometime in the fall of 2019, an arbitration of Billiot’s grievance was scheduled to occur in January 2020 before the selected arbitrator. (Tr. 51 and 53.)

B. The December 16, 2019 Employer RFI, the Union's Timely December 23, 2019 Response, and the Arbitrator's January 7, 2020 Unchallenged Bifurcation Order 22 Days Later

On December 16, 2019, on the eve of the upcoming January arbitration, the Employer
 5 emailed the December 16, 2019 Employer RFI which, among other items, requested three
 categories of economic mitigation damages information from the Respondent with respect to the
 Billiot grievance specifically asking for:

(1) All tax records from 2018 through present date; . . .

(6) List of Grievant's [Billiot's] gross income for each calendar year from 2018 to
 present date; . . . and

(8) Any unemployment, social security, or workers' compensation claims that
 15 Grievant has filed from 2018 to present date; whether any award was received; and the
 amount of the award.

(GC Exh. 1(c) at 2-3; GC Exh. 1(e) at 9-10.)

The Employer's counsel, Marr, explained at hearing that one reason for the December 16,
 20 2019 Employer RFI was because the Respondent had requested a backpay remedy for the grievant
 as part of Billiot's grievance. (Tr. 42 and 54.) A second reason given at hearing by the Employer's
 counsel Marr for the December 16, 2019 Employer RFI was that the economic information
 requests were for settlement purposes prior to the January 2020 arbitration as the Employer did
 25 not know if Grievant was working during the period after her termination and in case she was
 working or if she was not, that would influence the amount that Employer was prepared to put on
 the table to try to settle the grievance. (Tr. 42-43 and 55.)

A final reason for the December 16, 2019 Employer RFI as explained by Employer counsel
 30 at hearing was that the three outstanding economic information requests were to elicit information
 for Employer's counsel to use on cross-examination of the Grievant at arbitration as Marr further
 stated that he likes to have as much information as he can to cross-examine a witness. (Tr. 42-43
 and 56-57.) However, the Employer's counsel did not communicate with the Respondent or its
 legal counsel in December 2019 that one of the reasons for the December 16, 2019 Employer RFI
 35 was for purposes of cross-examination of the Grievant.⁵ (Tr. 57.)

One week later, on December 23, 2019, Respondent answered the December 16, 2019
 Employer RFI as follows:

⁵ In fact, the bifurcated arbitration of Billiot's grievance went forward on January 16 and 17, and November 16,
 2020, and the Employer's counsel did not ask the Grievant any questions on cross-examination related to economic
 or financial information because the arbitrator had bifurcated the arbitration on January 7, 2020, and had ruled that
 this economic information was unnecessary to determine liability at the bifurcated arbitration. Tr. 40, 60-61; R Exh.
 5.

The [Respondent] objects to the Employer's request in its entirety. The CBA does not contain any provision between the parties which permits pre-arbitration discovery. A copy of the CBA is also attached for your convenience.

Moreover, the NLRB has held that the NLRA does not entitle the employer to pre-arbitration discovery. *See, e.g., California Nurses Asssoc.*, 326 NLRB 1362 (1998)(“. . . it is well settled that there is no general right to pretrial discovery in arbitration proceedings.”). The courts similarly note that “when contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties that are normally associated with formal trial. One of these accoutrements is the right to pre-trial discovery . . .” *See, e.g., Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980)(*citations omitted*).

The Employer's request[s][siq.], in summary, seek: (1) *Grievant's tax records from 2018 through present*; (2) *Grievant's residential addresses from 2018 through present*; (3) *List of all of Grievant's applications for employment*; (4) *List of Grievant's employment from 2014 to present*; (5) *Any discipline, reprimands, warnings, in Grievant's employment from any employer from 2014 to present*; (6) *List of Grievant's gross income for each calendar years from 2018 to present*; (7) *Any certifications, trainings, or licensures Grievant has attended/obtained/maintained from 2018 to present*; and (8) *Any unemployment insurance, social security, or workers' compensation claims that Grievant has filed from 2018 to present, and whether any award was received and the amount.*

In addition to the well-established rule that pre-arbitration discovery is not permitted in this matter, [Respondent] also objects that the information and documents sought are irrelevant. The Employer does not have any legal or contractual right to obtain the Grievant's tax returns, her sources of income, or evidence of her job search efforts, especially at this point where the Arbitrator has not yet ruled on the merits of the grievance, or awarded any back pay to the Grievant. Furthermore, the information and documents sought are private and confidential to the Grievant, and no documents regarding the Grievant's personnel matters with other employees, even if such documents exist, would [siq.] be provided to the Employer as it would violate the Grievant's right to privacy. Any documents related to mitigation of damages would not become relevant or subject to review until the Arbitrator sustains the grievance and the issue of remedies is to be determined. During the arbitration hearing, if the Arbitrator rules that such information is relevant at that stage, the Employer will have the opportunity to examine the Grievant. The Employer can then inquire about Grievant's interim employment and income.

For these reasons, [Respondent] objects to the production of the requested information and documents. The Union is not going to burden the Grievant ahead of the upcoming holidays with this last minute request for irrelevant and confidential information. Please note that this letter and attachments are “cc” to

the Arbitrator, via DPR, as the January 16 and 17 hearing dates are fast approaching.

(Tr. 43–44; GC Exh. 1(e) at 12–13.)⁶(Emphasis added.)

At no time did the Employer ask the Union to bargain about the Union’s claim that the information requested in the December 16, 2019 Employer RFI was confidential or the Union’s position that any documents related to the economic information, mitigation of damages, and the issue of remedies would not be relevant or subject to review until the Arbitrator sustained the Billiot grievance and she prevailed at the initial merits or liability phase. (Tr. 58–60.)

On January 2, 2020, the Employer’s counsel emailed Respondent and the arbitration administrator in the upcoming Billiot grievance arbitration requesting that the January 16, 2020 arbitration be postponed because Respondent had not produced the outstanding three categories of requested economic information contained in the December 16, 2019 Employer RFI in the 17 days that had passed and Employer’s counsel also threatened to file a charge with the National Labor Relations Board (NLRB) regarding Respondent’s failure to produce the requested economic information. (R Exh. 1 at 4–5.)

Also, on January 2, 2020, Respondent’s counsel emailed the same arbitration administrator, copying Employer’s counsel, and writing that:

The Union objects to a continuance on the basis that this is an effort to delay a hearing on the merits of [the Billiot] grievance that has been pending since Grievant’s [Billiot’s] termination in July 2018 with Employer’s last-minute request for irrelevant information. It should be noted that the Union’s objection to the Employer’s [12/16/19 RFI] request was served a week and a half ago.” (R Exh. 1 at 3.)

On January 7, 2020, counsel for Respondent and Employer participated in a telephone pre-arbitration conference with the selected Arbitrator in the upcoming arbitration of Billiot’s grievance scheduled to begin on January 16, 2020, to discuss, among other things, the December 16, 2019 Employer RFI. (Tr. 44; GC Exh. 1(c) at 3.)

At this January 7, 2020, conference, the Arbitrator issued her Bifurcation Order for the upcoming arbitration trial which divided the hearing in two—first conducting a hearing on the merits of Billiot’s grievance, and if Billiot prevailed at this first merits or liability phase of the arbitration, there would then be a second phase arbitration hearing on the appropriate remedies or damages for Billiot. (Tr. 44–45.)

⁶ Items, 1, 6, and 8 are underlined above because of the eight categories of requested information, the Acting General Counsel and the Employer maintain that only these three categories of economic information are at issue here and should have been produced by the Respondent ahead of the first merits or liability phase of the arbitration despite the clear understanding of the Arbitrator’s January 7, 2020 Bifurcation Order and the corresponding unchallenged Bifurcation Agreement. Tr. 44–46; GC Br. at 8–15; CB Br. at 4–15.

Employer admits that on January 7, 2020, the Arbitrator bifurcated the arbitration so that she would first determine whether Billiot had been terminated for good cause. (Tr. 45.) Employer's counsel also admits that if the Arbitrator ruled against the Grievant and found that she was terminated for good cause, "there would not be a need for that [outstanding] information [requested in the December 16, 2019 Employer RFI] for the arbitration hearing." Id.

Finally, Employer counsel also admits that if the Arbitrator determined that there was not good cause for Billiot's termination and issued a ruling in favor of Respondent Union and Billiot, then the Arbitrator would hold a subsequent arbitration hearing where economic damages would be evaluated. (Tr. 45, 57.) Again, not until Billiot and Respondent Union prevailed at the first merits or liability phase arbitration, however, would Respondent be required to provide the outstanding information requested by the December 16, 2019 RFI. Therefore, the requested economic information in the December 16, 2019 Employer RFI would not have to be produced to Employer until *after* Billiot won the first merits or liability phase of arbitration and the Arbitrator issued her decision in Billiot's favor but *before* a second phase of arbitration on economic damages and remedies. Id.

Respondent, Employer and its counsel all conceded that once the Arbitrator ruled on January 7 that the January 16, 2020 arbitration hearing was bifurcated and that the information requested in the December 16, 2019 Employer RFI need not be produced for the first merits phase of the bifurcated arbitration, the parties accepted her ruling and the parties proceeded to the hearing on the merits (collectively this agreement by the parties is referred to hereafter as the "Bifurcation Agreement"). (Tr. 45–46, 57, and 92; R Exh. 5 at 6; AGC Br. at 4; CP Br. at 3, fn. 1.) The Arbitrator did not require Respondent to produce the requested economic information during the merits phase of the arbitration. (Tr. 46.) Moreover, Employer's counsel explained that only the non-economic information requests were at issue in this first merits proceeding and that the Arbitrator ruled on January 7, 2020, that the nonrelevant economic information could be "determined and produced at another time" *after* the merits phase of the first bifurcated arbitration.⁷ (Tr. 57–61.)

The Employer never challenged the Arbitrator's January 7, 2020 Bifurcation Order or the corresponding Bifurcation Agreement.

Grievant's bifurcated arbitration went forward on January 16 and 17, and November 16, 2020, and the Employer's counsel did not ask the Grievant any questions on cross-examination related to economic or financial information because of the Bifurcation Order and the corresponding Bifurcation Agreement, and thus the Arbitrator had found that this economic information was irrelevant to determine Employer's liability for Billiot's termination at the bifurcated arbitration. (Tr. 40, 60–61; R Exh. 5.)

The Employer filed the charge in this proceeding on March 23, 2020. (GC Exh. 1(a)).

⁷ On October 27, 2020, the parties understood that the Arbitrator defined relevant non-economic information for the first merits or liability phase of arbitration as Category 7 which is not at issue here for "only [Grievant's] training, licensing and other matters prior to and during [Grievant's] employment is relevant; materials after termination are not." GC Exh. 1(e) at 10; R Exh. 5 at 1 and 5; R Exh. 6 at 6.

On March 27, 2020, the Employer counsel emailed the Union and wrote, among other things, that:

In addition [Employer] requested information from [sic.] [the Union] before the [arbitration] hearing commenced. Your counsel contended that there was no duty to provide information in anticipation of an arbitration hearing. Your [current] request [for information from the Employer] is inconsistent with your counsel's position on our request for information, and for that reason, I also object [to the Union's current request for information from the Employer.]

(R. Exh. 4 at 3.)

On May 14, 2020, Union counsel reminded the Employer counsel that the Bifurcation Agreement remained in place unchanged from January 7, 2020, and that the Grievant's interim earnings after her July 2018 termination by the Employer were, therefore, still irrelevant for the first merits or liability phase of arbitration and would not become relevant, if at all, until "the arbitrator orders back pay . . ." and the Grievant prevails at the first phase of arbitration with the Arbitrator.⁸ (R Exh. 4 at 1.)

Again, on October 24, 2020, Employer made another pass at Respondent and the Arbitrator for a witness list and the economic damages information tied to the December 16, 2019 Employer RFI and Respondent maintained its position of not producing the requested information under the Bifurcation Agreement until the Grievant prevailed in the initial merits phase which was ongoing and expected to resume on November 16, 2020. (R Exh. 5.)

On November 16, 2020, the first merits or liability phase of the arbitration resumed and finished with the Arbitrator taking the matter under submission. (Tr. 40, 60–61; R Exh. 5.)

I take administrative notice that on March 5, 2021, Respondent counsel filed a motion to dismiss the complaint giving notice to the parties, Region 20 Regional Director and me, that on February 24, 2021,⁹ the Arbitrator ruled against the Grievant and found that she was terminated for good cause. As a result, Respondent argues that the information requested by the Employer in its December 16, 2019 Employer RFI is now moot because the Grievant did not prevail in the first merits or liability phase of the arbitration as part of the Bifurcation Agreement. Therefore, there is no longer any need for the information requested in the December 16, 2019 Employer RFI for her arbitration hearing. (Respondent's March 5, 2021 Motion to Dismiss Complaint as Moot.)

⁸ The parties' CBA at sec. 27. Grievance Procedure, subsection 27.1(k) provides in relevant part that if the arbitrator sets aside the discipline in any way, the arbitrator may award backpay to compensate the employee wholly or partially for any wages lost because of the discipline and in determining the amount of award for backpay, "the arbitrator shall deduct from the award sums received from unemployment compensation and other compensation received while the discipline was in effect." GC Exh. 1(e) at 53.

⁹ There appears to be some dispute between the parties as to whether the Arbitrator's denial of the Billiot grievance occurred on February 24 or February 25, 2021. See Respondent's March 5, 2021 supplemental filing which lists the February 24, 2021 date and Acting General Counsel's March 11, 2021 supplemental filing and Employer's March 12, 2021 supplemental filing which both mention February 25, 2021 as the date of the Arbitrator's denial of the grievance. Both dates provide the same legal effect in this case as I find that for the reasons stated herein, the complaint has become moot and shall be dismissed.

I also take administrative notice that on March 11 and 12, 2021, Acting General Counsel and Charging Party counsel, filed their respective oppositions to the Respondent's March 5, 2021 Motion to Dismiss arguing that nothing had legally changed with the Arbitrator's issuance of her February 24, 2021 decision against the Grievant.

III. LEGAL ANALYSIS

A. The Parties' Contentions

The Acting General Counsel alleges that the Respondent Union violated Section 8(b)(3) of the Act because it failed and refused to furnish relevant information requested by Charging Party Employer since December 23, 2019, which information the Acting General Counsel argues was relevant and necessary to facilitate exploration of settlement in the underlying Billiot grievance filed by Respondent. (Tr. 22; GC Exhs. 1(a); 1(c) at 3; 1(d); 1(k); and 1(l); GC Br. at 8–15.)

The Respondent denies these allegations and avers, among other things, that the Charging Party Employer's unfair labor practice charge and the Acting General Counsel's complaint in this matter are wholly without merit and should be dismissed for failure to state a claim against the Union. (R Br. at 2.) Respondent also argues that the evidence in the record supports a finding that the 12/16/19 Employer RFI "did not seek relevant and necessary information from the Union . . ." (R Br. at 2.) Respondent further argues that: ". . . the record indicates that on December 23, 2019 Respondent offered to provide the information if the labor Arbitrator sustained the grievance and awarded backpay to the individual bargaining unit member. (R Br. at 3.)

Finally, Respondent also contends that: ". . . contrary to the contention in the complaint (par. 6(e)), neither the General Counsel nor the Charging Party presented a scintilla of evidence to support a finding that the information was relevant or necessary for the purpose of 'facilitating settlement of the grievance' as there were no pending or even potential settlement discussions between Respondent and Charging Party at the time the information was requested or anytime thereafter." (R Br. at 2–4.) (Footnote omitted.) Respondent further contends that not once did Charging Party claim that the proposed accommodations were unworkable or insufficient because the requested information was necessary or relevant for the purpose of "facilitating settlement" as the General Counsel alleged in the complaint and that the record clearly shows that there was no path to settlement at that stage of the grievance and arbitration procedure under the CBA, i.e., a year and a half after the grievance was filed and fully investigated and processed by the parties, with Respondent even having to resort to the NLRB in that time period in order to obtain information from the Charging Party. (R Br. at 5.)

The Charging Party agrees with much of the Acting General Counsel's arguments except that it argues that under Federal Rule of Evidence Rule 408, which provides that evidence of "conduct or a statement made during compromise about the claim" is inadmissible "to prove or disprove the validity or amount of a disputed claim or to impeach" or "contradict" a witness

which is what Respondent offered with its unaccepted non-Board settlement proposals. (See Tr.76; and R Exhs 6–8.) Consequently, Charging Party further argues that the evidence should not be considered. Also, the Charging Party adds that Respondent did not assert waiver as an objection to producing the requested information and Respondent's argument in that regard should not be considered. The Charging Party further contends that Respondent did have an obligation under the Act to provide Employer with the information it needed to prepare for arbitration and defend against the Billiot grievance. Finally, the Charging Party argues that the requested economic information is relevant and not confidential.

I find that Respondent's reference to its two November 2020 settlement proposals, at R. Exhs. 6-8, was presented and admissible under an exception to Evidence Rule 408 for "negating a contention of undue delay," as an alternative argument should I rule in the Acting General Counsel's favor here and ignore the parties' Bifurcation Agreement. For purposes of my recommended decision, however, I agree with Employer and find that Respondent's two settlement proposals are inadmissible under Federal Rules of Evidence Rule 408. Instead, as explained below, I give effect to the parties' Bifurcation Agreement and find that the parties agreed to wait for the Arbitrator's favorable ruling at the merits phase to Billiot, if ever, for the requested economic damages information to become relevant and necessary to require Respondent to produce. To allow the Charging Party Employer to later renege on its Bifurcation Agreement with Respondent Union could interfere in their future good faith negotiations and their ability to reach enforceable agreements.

B. Under the Bifurcation Agreement, Respondent Did Not Unreasonably Delay in Providing the Employer with Information Responsive to the December 16, 2019 Employer RFI

Section 8(a)(5) requires that an employer provide potentially relevant information necessary for a union to perform its statutory duties as the employees' exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 434 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). The employer's obligation applies with equal force to information relevant to enforcing existing collective-bargaining agreements and to formulating proposals for new CBAs. *Leland Stanford Junior University*, 262 NLRB 136, 138 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983). An employer must provide information regarding bargaining unit employees' terms and conditions of employment as it is presumptively relevant to a union's collective-bargaining duties. *Southern California Gas. Co.*, 344 NLRB 231, 235 (2005).

To determine whether an employer unlawfully delayed in producing a response to an information request, the Board considers the totality of the circumstances, including the complexity and extent of information sought, its availability, and the difficulty of retrieval. *West Penn Power, Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)) *enfd.* in relevant part 394 F.2d 233 (10th Cir. 1968). The duty to furnish information requires a "reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 *fn.* 9 (1993).

The Board has long held that a labor organization's duty to furnish information pursuant to Section 8(b)(3) of the Act is parallel to that of an employer's obligation to furnish information

pursuant to Section 8(a)(1) and (5) of the Act. *Firemen & Oilers Local 288 (Diversity Wyandotte)*, 302 NLRB 1008, 1009 (1991); *Service Employees Local 144 (Jamaica Hospital)*, 297 NLRB 1001, 1003 (1990).

Here, the Employer sent the Respondent Union its December 16, 2019 Employer RFI on the eve of arbitration during the heart of the 2019 holiday season. Seven days later on December 23, 2019, the Union timely responded to the December 16, 2019 Employer RFI, arguing, among other things, that the requested three categories of economic information would not be relevant until the Grievant prevailed with the merits or liability part of her grievance. (GC Exh. 1(e) at 13.)

On January 7, 2020, just over 3 weeks from the December 16, 2019 Employer RFI, the Arbitrator bifurcated the Grievant's arbitration into liability and damages phases and ordered that the outstanding three categories of requested economic information from the Respondent were unnecessary and would not be relevant, if at all, until the Grievant prevailed at the merits or liability phase of the arbitration. (Tr. 44–46, 57, 92; R Exh. 5 at 6; AGC Br. at 4; CP Br. at 3, fn. 1.)

On February 24, 2021, the Arbitrator ruled against the Grievant and she lost at the merits or liability phase of her arbitration thereby confirming that the information requested in the December 16, 2019 Employer RFI is unnecessary and irrelevant since Billiot did not prevail at the merits or liability phase of the arbitration. I find that the requested economic information became moot when Billiot did not prevail at her Grievance arbitration.

Normally, I would order the Respondent in this case to produce documents available to it or within its control and/or possession responsive to the three economic requests contained in the December 16, 2019 Employer RFI as the requested information is not private or confidential when a terminated employee's mitigation of damages is put at issue by the employee's filing of her grievance. I find on the issue of privacy or confidentiality of the requested documents here; Respondent has not satisfied its burden of showing such is the case. See, e.g., *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513–514 (4th Cir. 1996); *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 115 (5th Cir. 1982); this burden "is not easily met." *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986). Moreover, even if Respondent could show, for example, that there was reasonable cause to believe that disclosure of certain confidential or private economic damages information would cause clearly defined and serious harm—something that Respondent has not even remotely shown—a protective order could be sought to limit disclosure or redact the documents in question.

However, I further find that the totality of the unique circumstances here weighs in favor of finding that Respondent acted lawfully given its consistent and unbending position that due to the Bifurcation Order from the Arbitrator and the corresponding Bifurcation Agreement 22 days after receiving the December 16, 2019 Employer RFI, the requested economic information would not become necessary and relevant until the Grievant prevailed at the merits phase of arbitration, if at all. In *West Penn Power*, the Board held that the respondent employer did not unreasonably delay in responding to the union's information request seeking data regarding two

service centers. *West Penn Power*, 339 NLRB 585, 587 (2003). Although the respondent delayed up to 7.5 months, the Board held that the employer did not act unreasonably under the circumstances, including that the employer periodically advised the union it was compiling the requested data; five full-time staff worked on gathering the information; and the specific request had been made alongside other information requests, requiring substantial time to address. *Id.*

Similarly here, Respondent initially responded to the December 16, 2019 Employer RFI in 7 days and just 22 days after the issuance of the December 16, 2019 Employer RFI, the parties submitted their dispute about the requested economic information concerning the liability and damages phases of the arbitration of Billiot's grievance to the Arbitrator who ruled immediately on January 7, 2020, that the arbitration would be bifurcated into a merits phase and a damages phase and only if the Grievant prevailed at the merits or liability phase, would the requested three categories of economic information tied to the December 16, 2019 Employer RFI become necessary and relevant.

This requisite condition (the Grievant prevailing at the merits phase of her arbitration) never came to pass as the Arbitrator denied the grievance on February 24, 2021, and, therefore, the requested three categories of economic information from the December 16, 2019 Employer RFI have become unnecessary and irrelevant and the legal issues in this case are now moot because the Grievant did not prevail with her employment termination grievance. Given these unique circumstances, I find it reasonable that Respondent formed the Bifurcation Agreement with the Employer to allow the Arbitrator to bifurcate the Grievant's arbitration into a merits phase and damages phase. As of February 24, 2021, when the Arbitrator ruled against the Grievant that she did not prevail, the grievance became fully resolved and the requested economic information was moot and lacked legal significance going forward. Thus, there is no longer an actual dispute to resolve here.

Rather than penalizing the Respondent here, the Arbitrator's unchallenged Bifurcation Order is a procedure that should be encouraged for saving time and unnecessary expenses tied to an unnecessary and irrelevant document search and production. The January 7, 2020 Bifurcation Order from the Arbitrator is a commonly utilized method of eliminating possible unnecessary costs and delay by first determining the probable merit of the essential elements of the case. This method has been utilized and its use encouraged by the Board for years.

One such example is found in *Tappan Co.*, 254 NLRB 656, 657–658 at fn. 5 (1981), in which the Board adopted the administrative law judge's rulings, among which was a ruling that precluded the parties from litigating those allegations covered by a settlement agreement until such time and only if it was determined that a basis existed to warrant vacating and setting aside the settlement agreement. The judge, with Board approval, proceeded to find that the respondent did not violate Section 8(a)(1) of the Act regarding those allegations pertaining to conduct subsequent to the settlement, and therefore found no basis had been shown or existed to warrant setting aside the settlement agreement, and consequently found that the allegations contained in the amended consolidated complaint covered by the terms of the settlement were precluded from being litigated. See also *Ann's-Schneider Bakery*, 259 NLRB 1151, 1152, 1160 (1982)(Bifurcation used to first consider whether employer engaged in unfair labor practices

after the execution of the settlement agreement since a finding of failure to comply with the settlement agreement or of postsettlement violation was a prerequisite to a finding of violation based on presettlement conduct.)

The facts and parties' agreement to work with and follow an arbitrator's order is most similar to the facts in *Sinclair Refining Co.*, 145 NLRB 732, 733 (1963). In *Sinclair*, the Board dismissed the case as moot after the refusal to furnish information was resolved by the arbitrator. In addition, the Board also affirmed the trial examiner's recommendation that a complaint be dismissed where the parties had agreed to arbitrate the grievances and had selected the arbitrator; that the respondent expressed its willingness to supply any data the arbitrator ruled was necessary; that the respondent did furnish data in accord with the rulings of the arbitrator; and that the arbitration hearings on the grievances in question were completed before that case came to hearing before the trial examiner. Similarly here, the parties agreed to arbitrate the Billiot grievance, they selected the Arbitrator who ruled that the arbitration would be bifurcated making the economic damages information requested unnecessary until the Arbitrator first ruled in favor of the Grievant, if ever, and the Respondent provided the Arbitrator with noneconomic information that the Arbitrator requested as necessary; and that the arbitration hearing on the merits phase of the grievance in question was completed before the instant case came before me at hearing.

The cases cited by the Acting General Counsel and the Charging Party are distinguishable as none of them involve an agreed bifurcation at a grievance arbitration where the relevance of the requested economic damages information was conditioned upon a grievant prevailing at the merits phase of a bifurcated arbitration. In *Teamsters Local 921 (San Francisco Newspaper)*, 309 NLRB 901, 902 (1992), cited by the Acting General Counsel, the arbitrator ruled in favor of the grievant Micheletti and awarded him reinstatement and backpay and the union delayed in providing Micheletti's economic earnings information in February 1991 after the arbitrator had already ruled in favor of the grievant. Here, the Arbitrator did not rule in favor of the Grievant Billiot, so her economic earnings never became relevant or necessary to her grievance based on the Arbitrator's Bifurcation Order and the parties' Bifurcation Agreement.

I also reject the cases cited by Employer and especially its reliance on *Schrock Cabinet Co.*, 339 NLRB 182, 188 (2002), as entirely distinguishable without a bifurcated arbitration as here where Employer argues that the Board rejected an employer's similar argument that "the Union is not entitled to [documents relevant to damages] until the arbitrator decides where there is a breach of the agreement". (CP Br. at 8.) Unlike the instant action where the Arbitrator actually bifurcated the "merits or liability" phase of the arbitration from the "damages or relief" phase and ruled that the economic damages information requested here would not become relevant until the Grievant prevailed in the first merits phase, if ever, the administrative law judge in *Schrock Cabinet Co.* presided over parties who were heading to arbitration which had not been bifurcated and the respondent employer there argued that the damages information requested by the union to aid it in the grievance procedure would not become relevant until the union won at the merits phase. The administrative law judge rejected this argument in *Schrock Cabinet Co.* because the arbitration there was not a bifurcated like in this case and the judge

further stated that: “The short answer is that most arbitration hearings are not bifurcated in the way [r]espondent suggests.” *Id.* Because the Billiot grievance arbitration is bifurcated and was subject to the Bifurcation Order and the corresponding Bifurcation Agreement, the Respondent Union’s argument that the economic damages information requested by Employer would not be relevant and necessary until Billiot prevailed at the merits phase of her arbitration, if ever, has merit in this case.

I also reject the Acting General Counsel’s argument that the requested economic damages information was necessary and Respondent’s withholding it somehow “robbed the Employer of an opportunity to offer a meaningful settlement proposal and to possibly avoid the expense of litigation.” (GC Br. at 10.) The Employer was already informed under the parties’ CBA of the range of pay that Grievant could earn as a nurse. Employer voluntarily chose not to make a meaningful settlement offer knowing full well what the Grievant’s earning capacity was to offset the backpay it also knew was owed should Grievant prevail at the merits phase of the arbitration. Also, prior to the Bifurcation Agreement, the Employer’s counsel did not communicate with the Respondent or its legal counsel that one of the reasons for the December 16, 2019 Employer RFI was for purposes of settlement discussions. (Tr. 55–56.) Finally, the bifurcation of the arbitration avoided some litigation expenses by focusing on the merits phase first before opening things up to the added expense of producing economic damages information.

Based on the totality of the circumstances here, I find that Respondent’s consistent position that the requested economic damages information from the Grievant was unnecessary and irrelevant is reasonable pursuant to the terms of the Arbitrator’s unchallenged Bifurcation Order and the parties’ corresponding Bifurcation Agreement which provides that the requested economic damages information would not become relevant and necessary unless the Grievant first prevailed at the merits phase of her arbitration. On February 24, 2021, the Arbitrator ruled that the Grievant had not prevailed at the merits phase of her grievance arbitration. As a result, this February 24, 2021 ruling made the requested economic information completely unnecessary, irrelevant, and moot. Accordingly, I further find that with respect to the December 16, 2019 Employer RFI, Respondent did not unreasonably withhold the requested economic information in violation of Section 8(b)(3) of the Act.

CONCLUSIONS OF LAW

1. Bio-Medical Applications of California, Inc. and Liberty Dialysis-Hawaii, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent, Hawaii Nurses Association, OPEIU Local 50, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(b)(3) of the Act in any manner alleged in the complaint as it simply complied with the terms of the January 7, 2020 Bifurcation Order and corresponding Bifurcation Agreement and, in February 2021, when the Grievant did not prevail in the merits phase of her bifurcated grievance arbitration, the requested economic information became moot.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended¹⁰

ORDER

The complaint is dismissed.

5

Dated: Washington, D.C., May 21, 2021



Gerald Michael Etchingham
Administrative Law Judge

10

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.